Debolt Transfer Company *and* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters' Steel Haulers Local Union No. 800. Case 6-CA-13461

January 4, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On May 26, 1981, Administrative Law Judge Robert W. Leiner issued the attached Decision in this proceeding. Thereafter, General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified below.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] In dismissing the complaint, the Administrative Law Judge made an alternative finding that Flynn, assistant to the director of the Eastern Conference of Teamsters, waived any objection to the cancellation of the leases at the January 25, 1980, bargaining session. In adopting his finding, we do not rely on or find it necessary to reach his alternative finding.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge: This matter was heard before me in Pittsburgh, Pennsylvania, on February 9, 1981, upon a complaint and notice of hearing dated July 17, 1980, and Respondent's duly filed answer.[1] The complaint alleges a violation of Section 8(a)(3), (5), and (1) of the Act, by virtue of Respondent DeBolt Transfer Company unlawfully bypassing the Union and dealing directly with unit employees; by unilaterally implementing changes in terms and conditions of employment without bargaining with or receiving the consent of the Union; and by unlawfully terminating the employment of six employees, in violation of Section 8(a)(3) of the Act. Respondent admits various allegations of the complaint but denies any violation of the National Labor Relations Act, as amended, 29 U.S.C. §151 *et seq.*, herein called the Act.

At the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, to introduce and meet material evidence, to call and examine witnesses, and to present oral argument. At the conclusion of receipt of the evidence, the parties waived oral argument. Respondent and the General Counsel filed post-hearing briefs. Upon consideration of the entire record, including the briefs, and my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The complaint alleges, Respondent admits, and I find that at all material times, Respondent, a Pennsylvania corporation with terminal facilities located in Homestead and Ambridge, Pennsylvania, is a common carrier engaged in intrastate and interstate transportation of freight and steel commodities. In the 12-month period ending June 30, 1980, Respondent, in its business operations, derived gross revenues in excess of $50,000 for the transportation of freight from the Commonwealth of Pennsylvania directly to points outside that State. Respondent admits that, at all material times, it has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, Respondent admits, and I find that the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters' Steel Haulers Local Union No. 800, is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The parties agree that for purposes of this proceeding, Respondent maintains two trucking terminals: Homestead and Ambridge, Pennsylvania. At both locations, Respondent's employees include not only drivers who operate Respondent's own tractors and trailers but also employees known as "owner-operators" who, while employees of Respondent, drive tractors and trailers which they lease to Respondent. Drivers, other than the owner-operators, operate, but do not own, equipment and do not lease the equipment to Respondent.

Aside from other company drivers at both of its locations, at all material times, Respondent employed four owner-operators at the Homestead terminal; two owner-operators at the Ambridge terminal. The owner-operators at both of the terminals are represented by Local 800 of the Teamsters; the other drivers at both terminals

[1] The charge in this case was filed and served by the Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters' Steel Haulers Local Union No. 800, on May 15, 1980.

are represented by other Teamsters locals: Teamsters Local 249, Homestead, and Teamsters Local 261, Ambridge.

Local 800, founded in the early 1970's, represents employees who are owner-operators of steel-hauling tractors and/or trailers for steel-hauling employers. At the Homestead terminal, Respondent maintained the practice of leasing tractors and trailers from owner-operators for a period of more than 5 years; at the Ambridge terminal for a period of 6 months, both periods occurring before, and ending with Local 800's strike against, *inter alia*, DeBolt in the period August 1979 through January 25, 1980. The ordinary leasing practice both at Ambridge and Homestead was for Respondent to lease from a single owner-operator both his tractor and trailer. Indeed, it was rare that Respondent leased only a trailer or a tractor.

Along with other employers in the eastern United States engaged in the iron and steel trucking business, Respondent, in the period April 1, 1976, through March 31, 1979, was a party to the National Master Freight Agreement (herein called NMFA) with the Eastern Conference of the Teamsters Union and the several local unions representing its employees. Although the record is not clear as to when Respondent (as an independent employer rather than as a member of any multiemployer group) executed this expired agreement (G.C. Exh. 4), there is no dispute that it was bound by that agreement. The record shows that there was no successor agreement executed upon the termination of this 1976–79 NMFA and this resulted in the above strike of August 1979. Thereafter, the employers in the industry, including Respondent, about January 1980, executed a further NMFA effective for the period April 1, 1979, through March 31, 1982. (G.C. Exh. 3; herein sometimes known in the record as "the Red Book.")[2]

The parties agree that the current NMFA provides, in detail, for the terms and conditions of employment of owner-operators including the applicability of grievance procedures (art. 8; art. 44–45) and the compensation of the owner-operators (arts. 22, 55, and 61).

It should be noted, in particular, that art. 55, section 18 (G.C. Exh. 3, the current NMFA) dealing with owner-operators, states, *inter alia*, that the employer is prohibited from putting into operation any "scheme" to defeat the terms of the agreement "wherein the [contract] provisions as to compensation for services on and for use of equipment owned by owner-operator shall be lessened, nor shall any owner-operators' lease be cancelled for the purpose of depriving employees of employment and any such complaint that should arise pertaining to such cancellation . . . shall be subject to Article 44 . . . ." Section 44 provides, *inter alia*, for the establishment of an employer-local union grievance committee which hears all grievances of owner-operators except (as provided in sec. 61) those relating to the *rates* of leases and compensation of the owner-operators under article 61. To review and adjust employer complaints on the wage *rates* and practices, because of competitive problems relating to owner-operators, a "Competitive Review Board" is established for that purpose under article 61, section 7.

At the hearing, Respondent amended its answer to admit that (1) on or about January 25, 1980, Respondent and the Union entered into the NMFA (G.C. Exh. 3) effective for the period April 1, 1979, through March 31, 1982; (2) the employees covered in the multiemployer bargaining unit set forth in articles 2 and 3 of the NMFA, including employees of Respondent, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act; (3) Local 800 and affiliated local unions of the International Brotherhood of Teamsters have been the designated as exclusive collective-bargaining representative of the employees in the multiemployer unit, and have been recognized as such representative by Respondent for its employees pursuant to successive collective-bargaining agreements; and (4) at all material times, the Union by virtue of Section 9(a) of the Act has been and is the exclusive representative of the employees in the multiemployer unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

As above noted, a strike among Respondent's and the industry employees started about August 22, 1979, after the expiration of the NMFA, March 31, 1979, and ended on or about January 20, 1980.

B. *Contract Execution of January 25, 1980*

On January 25, 1980, Respondent, as an individual employer, met with the Union at a motel in Greentree, Pennsylvania, for the purpose of negotiating and executing a successor collective-bargaining agreement for that which had expired on March 31, 1979. Present were Richard Wallace (General Counsel's sole witness; no other witness was called in support of the complaint) a business representative of Local 800 for 3 years and responsible for representation of the owner-operators at Respondent's two terminals; Robert Flynn, assistant to the director of the Eastern Conference of the International Brotherhood of Teamsters; Joseph Mazza, Steel Division Teamsters representative; Jerry Shulteis, an assistant to Flynn, present to take notes at the collective-bargaining session;[3] Ray Slogan and Bill Barber, steward and business representative, respectively, of Teamsters Local 249; and, for Respondent, John DeBolt and Stanley Wilmot, president and general manager, respectively, and Thomas MacMullan, attorney for Respondent.

It is undisputed that Respondent was meeting financial hardship in the operation of its business. At this meeting, DeBolt and attorney McMullan, demanded any and all forms of economic relief which were enjoyed by any other employer subject to the NMFA. DeBolt credibly testified that he told Flynn that he could not sign the "Red Book" because to do so would be to commit eco-

[2] I have maintained the identification of documents made at the hearing: thus the "Red Book," which is the current NMFA which binds Respondent. (G.C. Exh. 3.)

[3] Neither Shulteis nor the presumptively corroborative notes were produced, nor were there any other Teamsters witnesses to this bargaining session whose testimony might be deemed favorable to General Counsel's case. Cf. *District 65, Distributive Workers of America (Hartz Mountain Corporation)*, 593 F.2d 1155, fn. 21 (D.C. Cir. 1978).

nomic suicide; that it was futile to sign it because Respondent could not live under its terms. Wallace testified only that he could not recall DeBolt saying this. I credit DeBolt. Wallace was sitting 12 feet away from DeBolt and Flynn who faced each other across the table. Wallace recalled that DeBolt and McMullan mentioned that in respect to another employer, Spector Industries, they were entitled to cancel the lease arrangements with their owner-operators, and Respondent wanted that right; that Flynn told them that if Respondent wanted that relief it must abide by article 61, section 7, which would place the matter before the Competitive Review Board; and that Flynn said that Respondent could not get relief on an overall basis but that each of his claims would have to be reviewed. MacMullan insisted that he wanted the relief accorded to all carriers but Flynn insisted that he must use contract procedures and get relief from the Eastern Conference. In particular, Wallace recalls that Flynn made the same statement with regard to Respondent's demand for the right of trailer leasing cancellations.

Wallace testified that the Union told Respondent with regard to the cancellation of the trailer lease in the Spector case, that such a cancellation was an individualized case, and that Flynn said that, as in the Spector case, Respondent must utilize contract procedures to get relief from its trailer leases. In particular, Wallace denied that the Spector case was thrown in by the Union as an inducement for the Company to execute the contract.

There is no dispute that Respondent demanded, in the alternative, that it receive the benefit of the "Lakeshore Rider,"[4] and that the Union refused Respondent's request.

DeBolt's subsequent testimony contradicts Wallace's. Debolt testified that he then regarded the parties at impasse after the Lakeshore Rider was refused but told Flynn that, to sign the contract, he needed economic relief. According to DeBolt, Flynn then told him that the contract itself permits relief; that Respondent had the right under the existing contract (G.C. Exh. 3) to cancel the truck (trailer) leases and that the owner-operators would have to "pull company trailers."[5] Flynn, according to DeBolt, then asked whether this would help him out. DeBolt said that he asked Flynn whether Flynn was "sure" that Respondent had the right to cancel the trailer leases. Flynn said that they did; that it had been done successfully with another company and had been upheld by the Central States Teamsters Conference. DeBolt said that he then asked Flynn whether that would be effective with regard to him in their eastern states conference area. Flynn, according to DeBolt, said that since it was okay in the central states, there would be no doubt that it would be okay in the eastern conference area. With that assurance, DeBolt testified that he then signed the contract on behalf of Respondent and that was the only reason he signed.

While DeBolt agrees that there was a discussion between him and Flynn with regard to the presentation of matters before the competitive review board, DeBolt said that this had to do only with regard to Respondent's request for other economic relief such as reduction in the pension and health and welfare contributions. With regard to these other requests for relief, Flynn, according to DeBolt, said that there would be no general right to a reduction in these *rates* but that these requests for economic relief, i.e., changes in contract rates, would have to be submitted on an individual basis before the competitive review board.

After he signed the "Red Book," DeBolt testified that he was still "wary" of Flynn's assurance that Respondent had the right to cancel the trailer leases. He said that when this January 25, 1980, meeting ended, he asked Flynn to put in writing what the Union had agreed to at the meeting with regard to Respondent's right to cancel the trailer leases. Flynn agreed to do so as soon as he got back to Washington, D.C.[6] Respondent canceled the leases on the next working day, Monday, January 28.

On Monday, January 28, 1980, Respondent, by its general manager, Stanley Wilmot, sent certified mail letters (G.C. Exhs. 5(a)–5(f)) to each of the six owner-operators to the following effect:

> You are hereby notified that any and all lease agreement(s) between yourself and DeBolt Transfer, Inc., will be cancelled and become null and void as at 12:00 p.m. (midnight) Sunday, February 3, 1980, in accordance with the five (5) day notification provision contained in paragraph (1) of said lease(s).
>
> Please arrange to sign and obtain a new lease from this office which will become effective 12:01 a.m., Monday, February 4, 1980 for future use.
>
> Very truly yours,
>
> DeBolt Transfer, Inc.[7]

By letter (Resp. Exh. 1) dated January 29, 1980, Flynn wrote to Respondent as follows:

> Please be advised that equipment leases may be cancelled in accordance with the collective-bargaining agreement. As an example, you have the right to add Company equipment provided that there is

[4] The ordinary method of compensation under Respondent's leases of owner-operator trailers and tractors was to pay 75 percent of the gross revenues as compensation for such leases, retaining 25 percent for itself out of which it paid the drivers' health and welfare, pension, and other fringe benefits. It is undisputed that such a ratio sometimes resulted in Respondent losing money because the retained 25 percent was exhausted by fringe benefits and other direct costs. The "Lakeshore Rider" while permitting Lakeshore to retain only 20 percent of the gross revenues, granting the driver 80 percent of the gross revenues, but required the employee to pay his own fringe benefits out of his 80-percent compensation.

[5] Again, the only limitation on cancellation is in art. 55, sec. 18: to prevent cancellation where the purpose is to deprive the owner-operator of employment. Since complaints regarding the employer's cancellation are heard, under that section, pursuant to the grievance procedure, the terms themselves assume a right of cancellation in the employer subject only to subsequent grievance. Nothing therein suggests an obligation to bargain before canceling.

[6] January 25, 1980, the day of execution of the present NMFA, fell on a Friday.

[7] These letters were sent to owner-operators William Leach, Ralph Johnson, Carlo DeSimone, Elmer Bates, Thomas Bates, Eugene McLamore. The complaint alleges that these six owner-operators (as a result of Respondent's unilateral action in canceling their leases) were thereafter unlawfully not scheduled for work upon their failure to execute new leases, in violation of Sec. 8(a)(3) of the Act.

no subterfuge to avoid the labor contract or to discriminate against the employees.

Article 22, Sections 5 and 6 both refer to the minimum 30-day cancellation clause for lease equipment. Article 55, Sections 5 and 6 also make reference to the minimum 30-day lease. Further, Section 15 provides for negotiation and arbitration of any disputes in this regard. Of course, Sections 16 through 20 of Article 55 are aimed at preventing subterfuges and violations of the agreement. Your attention is also directed to Article 43 (Seniority).

I trust that the above explanation in reference to the contract is satisfactory to you.

Sincerely,
s/s Robert T. Flynn
Robert T. Flynn

Lastly, DeBolt testified, with respect to his execution of the collective-bargaining agreement on January 25, that at the time of actually signing it, he told Flynn that, "I am only signing this 'Red Book' on your assurance that I have the right to cancel the truck leases." DeBolt testified that Flynn answered, "You have the right." DeBolt said that nothing was said regarding submission of these cancellations to the competitive review board or any other body. Thereafter, DeBolt said that Respondent was going to cancel the truck leases at its first opportunity and that someone the Respondent said, "Do what you want." Thereafter, after execution of the contract, DeBolt said that he spoke to Wallace and told him, "Your guys are not going to like this at all." DeBolt said that Wallace answered, "That's tough." DeBolt said that he rejoined, "If it is okay with you, it's okay with me." This testimony was received without objection and Wallace was not recalled to deny this testimony.

Wallace testified that although trailer leasing cancellation was mentioned, Flynn repeatedly stated that Respondent would have to go through contract procedures in order to gain such relief. He testified that at least two employers, J. F. Scott and CRST Company, had received relief although the relief did not relate to the leasing of equipment *but rather to rates of pay, pension and health and welfare contributions.*[8] One of them, CRST Company, was not a signer of the "Red Book"; with regard to the other, J. F. Scott, it was a "Red Book" signer, but the economic relief did not relate to the leasing of the equipment. Wallace, as above noted, did not testify with regard to DeBolt's testimony wherein, after the contract was signed, DeBolt told him that Respondent's employees would not like the lease cancellations and Wallace allegedly replied: "That's tough."

Wallace further testified that after the meeting on January 25, within 3 to 4 days, he received telephone calls from owner-operators inquiring why the trailer leases had been canceled. Wallace testified that he told them that he did not know but would find out. In subsequent telephone calls to Respondent from Wallace, he finally reached General Manager Wilmot who told him that Respondent felt that by virtue of the negotiations, Respondent was correct in canceling the truck leases. Without contradiction, Wallace testified that he told Wilmot that it was wrong to do so; was a definite breach of contract; that in order to cancel the leases Respondent had to go through the contract procedures to get relief; and that in two other trucking operations in which Respondent had an interest, Respondent had not terminated the trailer leases; and that Wallace believed that in doing so with regard to the two terminals in which the Union represented the owner-operators, Respondent was attempting to eliminate owner-operators at these two terminals and was using the trailer lease cancellations as a subterfuge to do so in violation of the contract.[9]

1. The two meetings between Wallace and Wilmot

Sometime in or about mid-February 1980, Wilmot and Wallace met at a restaurant in Pittsburgh wherein Wilmot repeated the request for economic relief and stated that Respondent wanted the Lakeshore Rider if the matter was to get off dead center concerning the cancellation of the leases. Wallace told him that the Lakeshore Rider provision was going to be withdrawn and could not be granted to Respondent. Wilmot placed this meeting as early March 1980. For purposes of this proceeding, the date placed by Wallace (he was unsure of the date) as some 2 weeks after receiving the first phone call would place the meeting sometime in mid or late February. The next meeting was held on April 1, 1980, notwithstanding Wallace's contrary recollection that it was held 2 weeks before April 1. It was held at the Howard Johnson's restaurant in Monroeville, Pennsylvania.

In any event, it would appear probable that this second meeting between Wilmot and Wallace (at which Wallace was accompanied by three owner-operator employees of Respondent) occurred after a letter (G.C. Exh. 6) from Flynn to DeBolt, dated March 7, 1980:

> I have been advised by the three Local Unions that you are blatantly violating the collective-bargaining agreement. [Your] conduct is not only a violation of the contract but is an unfair labor practice. Under the circumstances, the Local Unions reserve the right to take appropriate legal and economic action in protest of your unfair labor practices.
>
> We strongly object to your abuse of the rights of our members by taking unilateral action without regard to their rights or the collective-bargaining agreement. As far as we are concerned, you and your attorney have destroyed any credibility which you may have had and you may be assured that from this time on we will never again deal with you except at arm's length. You have abused the em-

[8] This corroborates DeBolt's testimony concerning the matters on which Flynn insisted the competitive review board procedures were required, i.e., changes in contract *rates*, whether wages or fringe benefits.

[9] The General Counsel conceded that the operations at other trucking terminals in which Respondent had an interest where those operations included the use of owner-operators and the leasing of tractors and trailers had no bearing on the instant case. Further, Respondent's lease cancellations in this case related only to trailers. It did not eliminate owner-operators and sought to maintain the truck leases.

ployees and the Local Unions and we will not forget you.

Very truly yours,

s/s Robert T. Flynn
Robert T. Flynn

Copies of this letter to Respondent were sent to Locals 249, 261, and 800, as well as to Thomas D. MacMullan, attorney for Respondent. The letter, itself, fails to deny the substance of the alleged agreement regarding lease cancellations at the January 25, 1980, meeting. At the April 1, 1980, meeting, Wallace accused Respondent of canceling the leases to the owner-operators (in view of not canceling owner-operators leases at other terminals in which Respondent had an interest) to eliminate owner-operators at two of Respondent's terminals and to break the Union at DeBolt Transfer Company. Wilmot denied this. Elmer Bates and the other owner-operators said that they could not afford to pull company trailers, that they were not going to pull company trailers and questioned why other owner-operators at these other "divisions" at which Respondent had an interest were allowed to do it and they were not. When the owner-operators asked whether something could be worked out other than the cancellation of their trailer leases, Wilmot said that there was no alternative that he could think of. Elmer Bates then asked whether a Lakeshore Rider arrangement could be provided and asked Wilmot why that could not solve the problem. Wilmot replied that it was up to the Union and not to Respondent. Wallace then said that he was taking the matter to the National Labor Relations Board.

It is undisputed that DeBolt never filed a request for relief under contract procedures. It was also conceded that other independent carriers (not members of any multiemployer bargaining group) like DeBolt had filed requests for relief and some of them have been granted. Respondent's witnesses testified that, pursuant to the January 25 meeting, they did not file for relief under the contract procedures because they believed that they had an agreement with the Union making such request for relief unnecessary in terms of their alleged right to cancel the trailer leases unilaterally.

On the other hand, Wallace testified that the *Union* did not file a grievance under the contract because of Respondent's alleged breach of contract (in the unilateral act of canceling the leases) because the Union already had three to four grievances on file against Respondent; and because the Union considered the filing of grievances a waste of time since Respondent has refused to abide by agreements settling the grievances. Wilmot, on the contrary, testified that on January 29, 1980, the parties settled five to six grievances which were all the outstanding grievances at that time; that there had been no complaints from the Union regarding the settlement of these grievances; and that there had been no allegation that Respondent has been dragging its feet in executing the agreed-upon solutions to the grievances. Indeed, according to Wilmot, there had been no union request for further action under contract procedures notwithstanding that the Union has been conducting an audit of Respondent's overall compliance with contributions to the various fringe benefit funds. Wilmot testified without contradiction, however, that this audit was not the result of any filed grievance by Local 800. Respondent notes that no grievance had been filed over lease cancellation by any of the owner-operators.

The leases in question herein, according to the agreement of the parties, relate to tractors and trailers separately. As above noted, the practice is for Respondent to lease both a tractor and a trailer from the owner-operator. It is agreed that the lease provides for a lease term of 30 days, cancelable by either party, however, on a 5-day written notice.

The parties agreed that in practice, from time to time, owner-operators have canceled tractor and/or trailer leases on a 5-day notice for economic reasons, equipment failures and other reasons not particularly specified in the record; and that Respondent's January 28, 1980, letters of lease cancellation, although phrased in terms of canceling "all lease agreements" were directed solely at the cancellation of the trailer leases. Indeed, the parties agree that it was the Respondent's intent to have the owner-operators use their own leased tractors to haul trailers which were owned by Respondent.[10] The parties further agree that the cancellations themselves were in accordance with the terms of the leases and that motivation for the cancellation of the leases was solely economic and was due to the fact that Respondent could not afford the terms imposed by the collective-bargaining agreement (G.C. Exh. 3) regarding the cost of leasing trailers; and that it was cheaper for Respondent to operate by having the owner-operators haul company trailers rather than leased trailers.

As a result of the above cancellations, none of the six owner-operators at Respondent's two terminals has executed or agreed to execute a new lease for his *tractor* and none of them has therefore been scheduled to haul merchandise for Respondent since the cancellation. The result is that none of them have therefore worked for Respondent since the lease cancellations.

2. Contention of the parties

The General Counsel argues that under *Local 24, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, et al.* v. *Oliver, et al.*, 358 U.S. 283 (1959), the wage rates involved in owner-operator leases are a mandatory subject of bargaining within the meaning of Sections 8(d) and 8(a)(5) of the Act; that there was an existing collective-bargaining agreement executed by Respondent and Local 800 (G.C. Exh. 3); that while individual cancellation of a lease may be a mere contract violation and not a violation of Section 8(a)(5), where, as here, there has been a change in the methods of payment (a mandatory subject) on a unitwide basis, a "blanket unilateral cancellation of trailer leases," there is an 8(a)(5) and 8(d) violation. Further, the General Counsel notes that Respondent took this unilateral action notwithstanding the existence of a

[10] Thus, the leased tractors would thereafter haul Respondent's trailers, not leased trailers.

contract mechanism (the General Counsel cites art. 2, sec. 5 or art. 61, sec. 7) to place its desired economic relief before the competitive review board by way of a grievance system.

Respondent has three arguments: (1) A contract waiver derived from the fact that the lease agreement itself permits, and the parties had in practice applied, cancellation on a 5-day notice which Respondent in fact gave; and therefore, the parties, including the Union (through its owner-operators and the lease) have agreed under the terms of the contract and the lease, and by practice, to the very procedure which Respondent followed in canceling all the owner-operator leases; and there is no difference between canceling one lease and all the leases especially where, as here, the contract provides for (and specifically defines the limits of) lease cancellation by Respondent, and where there has been no proof of subterfuge, and indeed where there has been a stipulation that Respondent's motivation has been solely economic. (2) Moreover, by virtue of the January 25, 1980, meeting, even if the collective-bargaining agreement and the lease do not provide express written waivers, then, in any case, Respondent notified, bargained, and received express consent of the Union to waive any contrary right in the Union not to grant Respondent the right to unilaterally cancel the trailer leases. (3) In any event, Respondent's conduct does not amount to an unfair labor practice but merely a breach of contract for which the Union's relief should be solely in the Federal courts under Section 301 of the Act for breach of contract or for arbitration under the terms of the agreement within the *Collyer* deferral doctrine. See *Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB 837 (1971).

3. Discussion and conclusions

The parties stipulated that Respondent's motivation in canceling the six leases was wholly economic.

I will assume, *arguendo*, that lease cancellation and lease rates, as part of, or impacting on, wages, *Teamsters* v. *Oliver*, 358 U.S. 283, are mandatory subjects of bargaining, *N.L.R.B.* v. *Wooster Division of Borg-Warner Corporation*, 356 U.S. 342, 349–350 (1958).[11]

There is nothing, however, in *Teamsters* v. *Oliver, supra, Wooster Division of Borg-Warner, supra*, or the General Counsel's citation of *Brown & Connolly, Inc.*, 237 NLRB 271, 279 (1978), which controls this case.

While it is true that the bargaining on January 25, 1980, related to Respondent's several requests for economic relief, and while it is also true that the Union may have refused any change in owner-operator lease or pay rates, including the Lakeshore Rider, except via a special showing of economic need made before the competitive review board (art. 61, sec. 7) to change the contract rates, there is nothing in the current collective-bargaining agreement, which, *inter alia*, provides for 30-day leases and their cancellation (G.C. Exh. 3) to prohibit Respondent from unilaterally terminating the leases.

The dispositive element in this case is that Respondent, after being refused any adjustment or rate reduction on leased equipment, unilaterally canceled the underlying leases. There is no General Counsel contention that Respondent failed to abide by the notice, or other mechanical requirements of lease cancellation. Rather, the General Counsel argues that the cancellation of the leases themselves, while not a change in pay rates, results in a severe impact on owner-operator "wages" and that cancellation requires good-faith bargaining and not unilateral change. I disagree.

The contract (art. 22, sec. 5; art. 55, sec. 6) provides for and recognizes the use and termination of leased equipment with a 30-day cancellation clause.[12] The basic contract limitation on the use of owner-operators is the prohibition (art. 22, sec. 18) against using any device or "scheme" to " . . . defeat the terms of the Agreement . . . nor shall any owner-operator lease be cancelled for the purpose of depriving employees of employment . . . ." The parties herein stipulated to the contrary: that cancellation of the leases was purely economically motivated. There was no argument or even assertion that Respondent's action here would deprive the owner-operators of employment. At most, the drivers would haul company trailers behind trucks which continued subject to their beneficial leases. In any event, Respondent's leases cancellation can hardly be called a "scheme." More important, the terms of article 55, section 18, as above noted, forbid that a "lease be cancelled for the purpose of depriving employees of employment . . . ." and directs complaints thereof to the agreement's grievance procedure (art. 44). It is thus plain from this language that, whatever the Employer's motive, the effect of the cancellation or the Union's redress, the Employer has the right of cancellation. The grievance procedure is here invoked after cancellation. Thus the employer does the canceling and there is *no bargaining* as a condition precedent to canceling.

I therefore hold that, regardless of any January 25, 1980, agreement at the bargaining table or Flynn's January 29, 1980, confirmatory letter to DeBolt, Respondent had the right, here, unilaterally, to cancel the trailer leases (keeping the truck leases); that Respondent did not in any way change or attempt to change the contract lease rates thereby;[13] that the terms of the lease and its cancellation, if impacting on wages or other terms and conditions of employment within Section 8(d) of the Act, were matters already agreed on by the parties; and that

[11] In view of the allegation that Respondent's conduct, in failing to schedule for work the owner-operators whose lease were canceled, whatever Respondent's benign motivation, violated Sec. 8(a)(3) of the Act, I reject Respondent's argument that the matter be deferred to arbitration under the collective-bargaining agreement pursuant to *Collyer Insulated Wire, supra*. See *General American Transportation Corporation*, 228 NLRB 808 (1977).

[12] There is no contention that the automatic 30-day renewal clause in Respondent's lease (G.C. Exh. 2) cancelable on merely 5 days' notice was inconsistent with the collective-bargaining agreement. If so, Respondent's lease form was a breach of that agreement. In any event, the matter was neither alleged, litigated, or argued. My right to interpret the terms of the agreement is limited, of course, to the presence or absence of an unfair labor practice. *N.L.R.B.* v. *C & C Plywood Corporation*, 385 U.S. 421, 428 (1967).

[13] There is no dispute that the "Red Book," the collective-bargaining agreement, requires the employer to pay 75 percent of the gross freight invoice as owner-operator wages and, of the retained 25 percent, pay the driver's health, welfare, and pension benefits.

Respondent's January 28 cancellation of the six leases herein was in accord with the Red Book where, as here, there is no assertion of an attempt to change the lease *rates* (clearly a matter for the competitive review board), a discriminatory purpose in the cancellations or an attempt at some sort of subterfuge.

The General Counsel's principal argument seems to derive from dictum in *Brown & Connolly Inc., supra*, 237 NLRB 271, 279, wherein it was asserted that while a unilateral, individual change from contract requirements in an employer's sick leave obligation is a mere breach contract, a mass unitwide unilateral change in the sick leave obligation would violate Section 8(a)(5). In the present case, Respondent is not unilaterally changing a contract term or the terms (rates) of the leasing; it is merely canceling the lease because of economic reasons; a contingency expressly provided for in the contract. The General Counsel, again, does not urge that the lease was inconsistent with contract provisions or cancelled other than under its terms. In the *Brown & Connolly*, dictum, the contract terms under which sick leave could be taken were at issue; here, Respondent was unilaterally terminating an agreement sponsored by and consistent with the collective agreement, but not changing any contract term. The contract, of course, does not require notice or bargaining on lease cancellation; it merely provides a minimum cancellation period. The fact that such cancellation has an impact on the owner-operator's income may be true. But that was part of the existing bargain agreed to by the Union.

Nothing in *Local 24, Teamsters Union* v. *Oliver, supra*, 358 U.S. 283, is to the contrary. As above, assuming, *arguendo*, that that case implies that the instant lease is a mandatory subject of bargaining, *N.L.R.B.* v. *Wooster Division of Borg-Warner Corporation*, the matter has been thoroughly bargained about and the fruit of such bargaining is the actual lease (G.C. Exh. 2). Thus, the result of the actual bargain permits Respondent to act under the terms of the lease which, I have noted, is not alleged to be inconsistent with the underlying collective-bargaining agreement, either by lease terms or motivation in the cancellation.

If, as the General Counsel urges (Br. p. 6):

> . . . the cancellation of trailer leases becomes a mandatory subject of bargaining under *Oliver* because the lease cancellation necessarily affects the amount of compensation received by the owner-operators . . . .

That result was bargained out by the parties by virtue of the Union recognizing—indeed, providing, in the contract for—the termination of the lease. Moreover, the evidence, undenied, shows that the actual practice is for either party to cancel the 30-day lease on a 5-day notice. To imply a lease cancellation bargaining obligation on Respondent[14] would be to change the bargain struck by the parties.

In any event, while the credibility issue legally thus need not be reached, yet in view of the evidence that Wallace, 10 feet from DeBolt and Flynn, may not have heard their entire conversation; the Union's failure to submit other witnesses to the January 25 bargaining session to support Wallace's testimony, especially the absence of Flynn and his notetaker; Wallace's failure to be called in rebuttal to deny DeBolt's testimony regarding a conversation with Wallace himself (" . . . your guys are not going to like this at all . . ." to which Wallace allegedly responded: "That's tough"); the presence of Flynn's unexplained January 29, 1980, letter which is consistent with DeBolt's testimony (that Flynn gave him permission to cancel the leases), I would credit DeBolt and discredit Wallace's contrary testimony regarding what Flynn authorized to DeBolt at the January 25 bargaining session.[15] I conclude, therefore, that Flynn, in the alternative, waived any union objection to unilateral cancellation.

It is recommended, therefore, that the complaint allegations of 8(a)(5) violations be dismissed.[16] Similarly, the refusal of Respondent to schedule for work the six owner-operators who refused to haul Respondent's trailers derives from neither an unlawful cancellation of their trailer leases nor any other alleged or proven discriminatory motive. It is their own refusal to haul company trailers that causes their idleness. I further recommend that the allegations alleging Respondent's discriminatory failure under Section 8(a)(3) of the Act to schedule the owner-operators be dismissed.

CONCLUSIONS OF LAW

1. DeBolt Transfer Company, Respondent herein, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. A preponderance of the credible evidence fails to establish that Respondent has violated Section 8(a)(5) or (3) of the Act, as alleged.

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[14] Query: If such an obligation devolves on Respondent here, would its owner-operators, contrary to current practice and mutual understanding, be barred hereafter from unilaterally canceling their leases with Respondent, even under the terms thereof, if Respondent objects, only if the Union first bargains to impasse with Respondent and then submits to the competitive review board (which apparently deals only with hardship rates under art. 61) or, more appropriately, the grievance committee under art. 44, 45?

[15] Since Respondent's lease cancellation is not inconsistent with the collective-bargaining agreement, there is no question of prohibiting recourse to DeBolt's and Flynn's testimony under the parole evidence rule. Even if it were inconsistent, however, I observe that Flynn's January 29, 1980, letter, written *after* the execution of the January 25 collective-bargaining agreement removes the bargaining conversations from the operation of the rule; and cf. *Richmond Homes, Inc.*, 245 NLRB 1205 (1979).

[16] Again, if Respondent sought to change contract rates of leased equipment, then, as the General Counsel argues, Respondent must come before the competitive review board (art. 6, sec. 7) to plead special circumstances. Here, since I hold the lease cancellation has been bargained over, resulting in a contract-approved lease and cancellation, the fact that cancellation has an impact on and adversely affects owner-operator wages (G.C. Br., p. 6) is a risk bargained over and resolved by the owner-operators' collective-bargaining representative. The economic result, foreseen in the collective-bargaining agreement, including unilateral risks of termination, must be borne by the parties.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[17]

It is recommended that the complaint be dismissed in its entirety.

[17] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.